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IN THE

Supreme Court of the United States

October Term, 1960

No. 519

DAVID L. RATKE and MONROE CAINE,
Petitioners,

v.

HONORABLE FRANK A. PICARD, UNITED STATES DISTRICT JUDGE FOR THE EASTERN DISTRICT OF MICHIGAN,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONERS' REPLY BRIEF

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The argument of the United States in opposition to the petition for a writ of certiorari is predicated upon an alleged rule of law that "the extraordinary relief by way of mandamus does not lie to review the mere exercise of discretion in denying an application for a transfer of venue" (Govt. Br. p. 4). In support of this proposition the opposing brief has cited *Parr v. United States*, 351 U. S. 513 and *Bankers Life & Cas. Co. v. Holland*, 346 U. S. 379. Neither of these cases, however, is authority for the rule of law urged. *LaBuy v. Howes Leather Co.*, 352 U. S. 249. In the *LaBuy* case this Court pointed out, contrary to the

Government's contention herein, that the *Bankers Life* case is not a holding that mandamus does not lie to redress an abuse of discretion particularly where the issue concerns rules promulgated by this Court. Similarly, in the *LaBuy* case, it was pointed out that the *Parr* holding was merely that the dismissal of an indictment is not an abuse of discretion vested in the trial judge.

The opposing brief cites *Petition of Nelson*, 199 F. 2d 878 (C. A. 3) to support its contention that an erroneous exercise of discretion is reviewable on appeal from final judgment and not by way of mandamus (Govt. Br. p. 5). The *Nelson* case involved the question of whether there was prejudice within the district which would prevent a fair trial. Such an issue would still be available for review on appeal after trial. In the case at bar, however, the issue would be rendered moot after trial. As was stated in *Ford Motor Co.* v. *Ryan*, 182 F. 2d 329, 330 (C. A. 2), *cert.* denied, 340 U. S. 851:

> "Judge Hand and I think this the kind of interlocutory order with which this Court can properly deal by way of such a writ, since should petitioners —the defendants—finally lose on the merits below, any error in the interlocutory order would probably be incorrectible on appeal, for petitioners could hardly show that a different result would have been reached had the suit been transferred. Nor, should petitioners win on the merits below, could they collect as costs the additional expenses to them, if any, due to the court's failure to order the transfer."

Clearly, mandamus is the only realistic means to redress an interlocutory order involving venue in a criminal case.

In any event, however, the holding in the *Nelson* case, *supra*, is apparently in conflict with the holdings of other

circuit courts on the question of the availability of mandamus to review an order denying a transfer of venue. See *Lemon* v. *Druffel*, 253 F. 2d 680, 683 (C. A. 6) for a resumé of the conflicting decisions in the various circuits. While this Court recognized the existence and importance of this issue in *Norwood* v. *Kirkpatrick*, 349 U. S. 29, 33, it did not specifically rule upon it.

Accordingly, in addition to the reasons previously stated, the writ of certiorari should be granted because of the conflict between the Circuits on a most important question involving the fair administration of criminal justice.

CONCLUSION

For the reasons stated, it is respectfully submitted that the writ of certiorari should be granted.

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